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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 93-144
Commission's Rules to Facilitate	)	RM-8117, RM-8030,
Future Development of SMR Systems	)	RM-8029
in the 800 MHz Frequency Band	)	
	)	
and	)	
	)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act -	)	
Competitive Bidding	)	
800 MHz SMR	)	

To: The Commission

COMMENTS OF CELLCALL, INC.

CELLCALL, INC.

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CONTENTS

SUMMARY

CellCall, Inc. ("CellCall") hereby submits its comments in response to the Further Notice of Proposed Rule Making in PR Docket No. 93-144, Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band (the "800 MHz Further NPRM").

CellCall supports many of the proposals set forth in the 800 MHz Further NPRM that would enable wide-area SMR systems to compete with other Commercial Mobile Radio Services. However, the Commission must adopt wide-area licensing rules for 800 MHz SMR spectrum that recognize the inherent differences between the heavily licensed 800 MHz SMR spectrum and other CMRS spectrum. The Commission also must take into account the disparate needs of traditional incumbent licensees and licensees seeking to offer wide-area service.

To this end, CellCall supports the licensing of 800 MHz SMR spectrum on an MTA basis, with two 100-channel blocks being licensed in each MTA. Eligibility to hold such licenses should be limited to incumbent upper-band 800 MHz SMR licensees and pending applicants for this spectrum.

CellCall generally supports the Commission's proposals to conform wide-area MTA licensee rights and obligations to those of other CMRS providers, but believes coverage requirements should be increased and the penalty for failure to construct MTA channels should be modified. Furthermore, incumbent licensees

should not be subject to mandatory relocation and should be permitted to expand their systems in certain limited situations.

Finally, CellCall believes the Commission's proposal to hold auctions for MTA licenses is inconsistent with Communications Act requirements that it consider licensing methods that work to resolve mutual exclusivity, and also is inconsistent with other statutory goals. By limiting eligibility for MTA licenses and by considering other approaches prior to holding auctions, the Commission can satisfy its statutory obligations.

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Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030, RM-8029
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and	)	
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Implementation of Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR	)	PP Docket No. 93-253

To: The Commission

COMMENTS OF CELLCALL, INC.

CellCall, Inc. ("CellCall"), by its attorneys, hereby submits its comments in response to the Further Notice of Proposed Rule Making, FCC 94-271, released November 4, 1994 (the "800 MHz Further NPRM"), and the Commission's Order, DA 94-1326, released November 28, 1994, in the above-captioned proceeding. The following is respectfully shown.

I. Preliminary Statement

1. CellCall owns and operates both conventional and trunked specialized mobile radio ("SMR") stations throughout a three-state area in the midwestern United States and has applied for authorization to provide wide-area enhanced SMR service in this region. Thus, CellCall has a substantial basis in experience for informed comment in this proceeding and stands to

be substantially affected by any new rules that govern the licensing of wide-area SMR systems.

2. The 800 MHz Further NPRM represents the third time in the recent past the Commission has proposed rules governing the authorization of 800 MHz SMR service on a wide-area basis.[1] Eighteen months ago, the Commission proposed licensing up to 42 SMR channels for reuse on a wide-area basis, using either Metropolitan Trading Areas ("MTAs") or Basic Trading Areas ("BTAs") as the defined service area, with eligibility to hold such licenses restricted to existing licensees within the service area, and also sought comment on various methods to resolve mutually exclusive applications.[2] Although this proposal acknowledged that wide-area SMR systems could be implemented under existing rules and policies,[3] the Commission nonetheless perceived a need to modify its rules in order "to ease ... large-scale industry transition to new system technologies and configurations," as well as to ease administrative burdens placed

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[1] See In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Notice of Proposed Rule Making, 8 FCC Rcd. 3950 (1993) ("800 MHz NPRM"); Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rule Making, 9 FCC Rcd. 2863 (1994) ("Regulatory Treatment Further NPRM"). Based on the similarity of the issues raised and the fact that many questions raised in the 800 MHz Further NPRM were directly addressed by commenters in these prior proceedings, the Commission should take office notice of the record therein.

[2] 800 MHz NPRM at paras. 15, 24, 27-29.

[3] Id. at para. 5.

on it by applicants seeking rule waivers to implement wide-area systems.[4] Despite substantial support generally for its proposals,[5] however, the Commission took no action.

3. The second wide-area 800 MHz SMR proposal followed passage of the 1993 Budget Act,[6] which, inter alia, amended the Communications Act of 1934 (the "Act") to authorize the Commission to conduct auctions of mutually exclusive applications under certain circumstances,[7] and required the Commission to conform its technical, operating, and licensing rules for services that are substantially similar.[8] In response to this legislative action, the Commission issued the Regulatory Treatment Further NPRM, in which it again requested comment on a modified plan for licensing wide-area SMR service.[9]

4. In the subsequent Regulatory Treatment Third Order[10] the Commission adopted some elements of the wide-area plan. However, the Commission again declined to adopt final

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[4] Id.

[5] See Comments filed July 19, 1993 and Reply Comments filed August 5, 1993 in PR Docket No. 93-144.

[6] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 ("1993 Budget Act").

[7] 47 U.S.C. § 309(j)(1)-(2).

[8] See 47 U.S.C. § 332(c); 1993 Budget Act § 6002(d)(iii).

[9] Regulatory Treatment Further NPRM, supra note 1, at paras. 29-34.

[10] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order, FCC 94-212, released September 23, 1994 ("Regulatory Treatment Third Order").

rules and postponed action on several key components, including service areas, channel assignments, and methods for resolving mutually exclusive applications.[1/] Instead, the Commission stated that it would seek further comment in the subject 800 MHz Further NPRM.

5. Throughout the extended period that the 800 MHz SMR wide-area licensing rules have been "in play," existing carriers like CellCall have been forced to continue to pursue their business plans despite uncertainty about the future licensing scheme. In CellCall's case, the company has continued to aggregate the channels it will need to offer a competitive wide-area SMR service. In adopting final rules, the Commission must strive to strike a balance between the need to improve wide-area licensing procedures without altering the landscape so radically as to frustrate the diligent efforts of those who have sought in good faith to create competitive wide-area SMR systems under previous rules and policies.

6. CellCall applauds the Commission's efforts in the Regulatory Treatment Third Order to adopt rules furthering the goal of regulatory parity, particularly with respect to certain technical and operational rules, including the elimination of

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[1/] After adoption of the original 800 MHz NPRM, however, the Commission continued to accept and process requests for rule waivers to allow the implementation of wide-area systems. And, in June 1993 the Commission adopted rule section 90.629, which authorizes extended implementation schedules for, inter alia, facilities that are part of a coordinated or integrated or wide-area 800 MHz SMR system. 47 C.F.R. § 90.629.

loading standards for 800 MHz SMR systems and uniform requirements for system construction and permissible communications.[12] CellCall also agrees with the Commission's decisions therein to authorize 800 MHz SMR service on a Commission-defined, wide-area basis, to adopt MTAs as the service area, and to permit MTA licensees to self-coordinate system modifications within their service territories without prior approval.[13] CellCall urges the Commission, however, in adopting final rules for wide-area 800 MHz service, to recognize the inherent differences between the heavily licensed 800 MHz SMR spectrum and other CMRS spectrum. The Commission also must take into account the needs of both existing SMR licensees and future MTA licensees and provide flexibility to both.

II. Service Areas and Channel Assignments

7. In the 800 MHz Further NPRM, the Commission proposes to divide the existing 14 MHz of SMR spectrum in the 800 MHz band into two classifications for licensing purposes. The "upper band" of 200 contiguous channels (a total of 10 MHz of spectrum) would be licensed on an MTA basis, in four 50-channel (2.5 MHz) blocks. The "lower band" of 80 non-contiguous channels (a total of 4 MHz) would be licensed individually or in groups of up to five channels on a BTA basis, or would continue to be licensed on a station-by-station, channel-specific basis.

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[12] See Regulatory Treatment Third Order at paras. 190, 207-09.

[13] Id. at paras. 95-99.

A. CellCall Continues to Support Geographic Licensing of Upper Band Channels Based on MTAs

8. The 800 MHz Further NPRM seeks comment on whether the 800 MHz SMR "wide-areas" should be MTAs or some other geographic designation.[14] CellCall continues to support[15] licensing wide-area systems on an MTA basis, and also supports the proposal to divide SMR channels into upper band and lower band channels for licensing purposes.

9. In the Regulatory Treatment Third Order, the Commission concluded that Part 90 wide-area SMR service is substantially similar to common carrier cellular service, and that therefore the two services should be subject to similar technical, operational, and licensing rules.[16] The Commission further concluded that it should "modify existing channel assignment rules and service area definitions, to the extent practicable, to permit 800 MHz SMR licensing on a wide-area basis because we have determined that such licensing will promote competition between 800 MHz SMR licensees and other CMRS licensees."[17] Based on these conclusions, the Commission should license wide-area SMR systems on an MTA basis.

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[14] 800 MHz Further NPRM at para. 20.

[15] See Reply Comments of CellCall, GN Docket No. 93-252, filed July 11, 1994. CellCall also earlier sought a wide-area SMR license based upon MTAs, but was told by the Commission that its request was premature.

[16] Regulatory Treatment Third Order at paras. 74, 78.

[17] Id. at para. 94.

10. The record established in response to both the original 800 MHz NPRM and the Regulatory Treatment NPRM demonstrates the need to authorize SMR service over a large service area that is market-based rather than site-specific.[18/] In the Regulatory Treatment proceeding, CellCall and other proponents of wide-area licensing generally supported a plan proposed by Nextel, Inc. ("Nextel"), which called for the establishment of a contiguous 200-channel block to be licensed on an exclusive basis to one licensee in each MTA. As the Commission noted, CellCall was among those who "stress[ed] the importance to wide-area SMR licensees of obtaining a clear, contiguous band of spectrum if they are to compete against cellular and broadband PCS licensees,"[19/] which are authorized, respectively, 25 MHz and 30 or 10 MHz of clear, or virtually clear, spectrum. The MTA regions are comparable to the service areas established for cellular and broadband PCS systems. These MTA regions reflect market forces, as the Commission has seen in smaller areas (e.g., MSAs and RSAs) aggregated by carriers to serve the wide-area service needs of the marketplace. In sum, access to spectrum across a substantial geographic area is vital to the ability of SMR licensees to implement advanced technologies and compete with other commercial mobile radio services.

[18/] See, e.g., id. at para. 87.

[19/] Id. at para. 91.

11. Granting 800 MHz SMR operators MTA licenses, however, will not be enough to foster competition. The fact that cellular and PCS operators have access to contiguous spectrum gives them technological flexibility that will not be enjoyed by SMR operators unless the Commission adopts the 200 contiguous channel band plan discussed in the 800 MHz Further NPRM.[20] Consequently, in order to encourage robust competition, the Commission should adopt the proposal advanced by Nextel to make available the 200 upper band channels for wide-area 800 MHz licenses, subject to the adoption of a workable transition plan for incumbents, as is discussed in greater detail below.

12. Notably, earlier opposition to the Nextel plan generally focused on two controversial aspects of the proposal: granting only a single license in each MTA, and mandatory relocation of incumbent upper band licensees to accommodate the MTA licensee.[21] Notably, neither of these controversial components is part of the Commission's current proposal, and the record of earlier comments does not dispute the need for clear, contiguous spectrum in order to compete with other CMRS offerings. Consequently, the Commission should adopt MTA-based service areas for the upper band channels.

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[20] For example, use of CDMA technology requires access to a contiguous channel block.

[21] See Regulatory Treatment Third Order at paras. 92-93.

B. The Commission Should Limit Eligibility for MTA Licenses

13. In the original 800 MHz NPRM, the Commission proposed limiting eligibility to hold a wide-area license to entities that were licensed on one or more SMR Category (i.e., upper band and lower band) channels in the MTA as of May 13, 1993, the date the NPRM was adopted.[22] Similarly, Nextel's proposal in the Regulatory Treatment proceeding was premised on limited eligibility.[23] Although the record generally supported limited eligibility,[24] in the Regulatory Treatment Third Order the Commission reversed course, and said there would be no restrictions on holding an MTA license.[25]

14. The only apparent reason for the Commission's expansive view of eligibility is its determination to accept mutually exclusive applications for MTA licenses and to award the

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[22] 800 MHz NPRM at para. 24.

[23] Nextel proposed that only "licensees with an ESMR (wide-area) grant or ESMR application pending within the MTA as of August 10, 1994" be eligible. See Comments of Nextel at 16-17; Regulatory Treatment Third Order at n.182.

[24] See, e.g., PR Docket No. 93-144, Comments of AMTA at 10; Comments of Dial Page, Inc. at 7; Comments of E.F. Johnson at 6; Comments of Fleet Call, Inc. at 10. See also GN Docket No. 93-252, Comments of AMTA at 20; Atlantic Cellular Co., L.P. at 2-3; CellCall at 6; Dial Page, Inc. at 3; Dru Jenkinson et al. at 2; Russ Miller Rental at 3-4; NABER at 8; Nextel at 11; OneComm Corp. at 8-9; Pittencrief Communications, Inc. at 3. Wireline common carriers, who have been prohibited from holding 800 MHz SMR channels, opposed limited eligibility. See Comments of BellSouth at 5; Comments of PacTel Paging at 4; Comments of Southwestern Bell at 4.

[25] Regulatory Treatment Third Order at para. 107.

licenses through competitive bidding.[26] This plainly violates Section 309(j)(7) of the Act, which forbids the Commission from basing "a finding of public interest, convenience, and necessity on the expectation of Federal revenues...." Significantly, in the 800 MHz NPRM, the Commission specifically found that the public interest would be served by limited eligibility, stating:

> Numerous SMR systems already occupy all 800 MHz SMR channels in many parts of the country. This extensive infrastructure, which is already in place, will as a practical matter be the foundation for any quality [wide-area SMR] offering. Furthermore, if applicants without constructed systems were eligible for initial MTA licensing, they would be required nonetheless to protect existing co-channel systems, and their MTA systems would therefore surround and provide no wide-area service to large central regions. Existing licensees, in contrast, could increase overall spectrum capacity by aggregating and reusing their authorized frequencies at their existing sites. We therefore believe that this initial license eligibility restriction would enable non-disruptive and efficient provision of service to the public, and thus Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), does not preclude us from setting these standards.[27]

15. The Commission has not adequately explained why it now favors open eligibility.[28] The circumstances supporting the

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[26] Id.

[27] 800 MHz NPRM at para. 24.

[28] The Act states that, notwithstanding its authority to use competitive bidding, the Commission has an "obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings." 47 (continued...)

Commission's earlier rationale for limiting eligibility have not changed. 800 MHz SMR spectrum remains heavily occupied. Co-channel incumbent licensees must be protected from interference.[29/] The Commission itself believes that mandatory relocation of incumbents is untenable.[30/] Consequently, an MTA licensee without an existing presence in the market would be unable to construct a true wide-area system, unless it is prepared to acquire already authorized spectrum, which it may do under existing rules.

16. Limiting eligibility is particularly appropriate in view of the disruption to existing wide-area SMR operators that has been caused by the long period of time that licensing rules have been in flux. For example, CellCall has had a request for extended implementation pursuant to existing Commission rules pending at the Commission since March 1994, without action due to the delays that regulatory changes have injected into the licensing process. In the meantime, CellCall has had to exercise options to acquire channels or risk losing spectrum necessary to

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[28/] (...continued)
U.S.C. § 309(j)(6). In view of this explicit Congressional intent, the Commission's failure in the 800 MHz Further NPRM even to propose limited eligibility as a means of overcoming the obstacles to implementing a wide-area SMR system that will have the ability to compete with other CMRS providers appears arbitrary. Thus, as set forth below, CellCall supports the auctioning of MTA licenses to eligible applicants only if applicants first are permitted to resolve their mutual exclusivity.

[29/] Regulatory Treatment Third Order at para. 145.

[30/] 800 MHz Further NPRM at para. 32; Regulatory Treatment Third Order at para. 106.

its service plans, but has been unable to incorporate the acquired spectrum effectively into its system due to delays in the processing of its pending wide-area request. Under these difficult circumstances, according CellCall and others who are similarly situated a licensing preference would serve the public interest. Thus, CellCall favors limiting eligibility to hold an MTA license to any entity that currently is authorized to operate within the MTA or whose application to serve any area within the MTA was pending as of August 9, 1994, the date the Commission adopted the Regulatory Treatment Third Order and stopped accepting new applications for 800 MHz channels.[31/]

C. CellCall Favors 100-Channel Upper Band Blocks and Unlimited Aggregation of Blocks

17. The Commission proposes issuing four 50-channel block licenses within each MTA. Although 50-channel blocks could result in a greater number of MTA licensees, and theoretically a greater number of competitors, 50-channel blocks simply may not offer the opportunity to implement a viable wide-area system. On the other hand, awarding a single 200-channel MTA license could diminish competition.[32/] Moreover, the record in the Regulatory

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31/ In the event the Commission eliminates the prohibition on eligibility of wireline telephone common carriers for SMR channel licensing, the Commission should also allow such carriers to hold MTA licenses. They have been prevented by rule from holding SMR licenses, not by lack of interest in providing competitive services.

32/ For example, both CellCall and Nextel (including its affiliates) have aggregated enough channels in the MTAs where CellCall has a meaningful presence to establish viable (continued...)

Treatment proceeding indicates that a single licensee may not require 200 channels to implement a wide-area system;[33] even if it does, allowing unlimited aggregation of channel blocks would permit it to do so. Consequently, CellCall believes that authorizing two 100-channel block licensees in each MTA offers the best solution.

18. CellCall agrees with the Commission's proposal not to limit the number of upper band channels a single entity may hold within a given MTA. Because the entire upper band spectrum amounts to only 10 MHz, restricting a single entity to less than this amount is inconsistent with the goal of creating competition to other CMRS providers, who are authorized a minimum of 10 MHz. Moreover, as the Commission notes, because there is a 45 MHz cap on the total amount of CMRS (cellular, PCS, and SMR) spectrum an entity may hold within a single market, there is little risk of anticompetitive harm from allowing unlimited SMR spectrum aggregation.[34]

D. Licensing of Lower Band Channels

19. As noted, the Commission seeks comment on two alternative plans for licensing of the lower band SMR channels. CellCall favors licensing the lower band channels in five-channel

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[32] (...continued)
competing systems. Granting a single wide-area license would, therefore, eliminate a competitor.

[33] See Regulatory Treatment Third Order at para. 103.

[34] See 800 MHz Further NPRM at para. 23.

blocks for use on a BTA basis; moreover, the Commission should license the 150 General Category channels and the 80 non-contiguous SMR channels on this basis. This scheme provides flexibility to licensees and administrative advantages to the Commission.[35/] Licensees also should be permitted to swap frequencies to aggregate contiguous channels that would comprise their BTA license.

20. CellCall agrees with other Commission proposals with respect to the lower band, including (1) allowing lower band channels to be used for any purpose that is technically consistent with the rules, whether as part of a lower band system or an upper band MTA system; (2) permitting frequency swaps between upper band and lower band licensees; (3) prohibiting an entity from obtaining more than five lower band channels at a time in one service area without constructing and commencing service on all previously licensed upper band and lower band channels in that area; and (4) prohibiting future requests for extended implementation on the lower band channels.[36/]

III. Rights and Obligations of MTA Licensees

A. CellCall Supports the Commission's Proposals Regarding the Rights of MTA Licensees

21. The Commission's primary purpose in codifying 800 MHz SMR wide-area authorization is to accord rights that allow the wide-area licensee to implement a mobile communications

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35/ See id. at para. 25.

36/ Id. at para. 26.

system that has the opportunity to compete with other CMRS licensees.[37] Cellular and PCS licensees now generally are permitted to self-coordinate and make minor modifications to their systems within their service areas (i.e., add, delete, move, and otherwise modify transmitting facilities without prior approval).[38] The 800 MHz Further NPRM proposes to grant similar rights to the holder of an 800 MHz MTA license.[39] Based on the Commission's conclusions that wide-area SMR service is substantially similar to cellular service and that the two services should be regulated similarly, CellCall believes that the Commission must incorporate the same treatment into its 800 MHz SMR rules.[40]

22. In addition to conforming the privileges of wide-area SMR licensees to those accorded other CMRS licensees, the Commission also proposes to grant MTA licensees certain other rights. Channels authorized to an incumbent 800 MHz SMR licensee would revert automatically to the MTA licensee if the incumbent fails to construct, discontinues operations, or otherwise has its

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[37] According to the Commission, MTA licensees should have the same flexibility as cellular and PCS licensees in terms of location, design, construction and modification of facilities throughout the service area. 800 MHz Further NPRM at para. 30.

[38] See 47 C.F.R. §§ 22.163, 22.165, 24.237, 24.815.

[39] 800 MHz Further NPRM at para. 30.

[40] It appears that similar proposals made in the Regulatory Treatment Further NPRM were not adopted because of the Commission's desire to auction these rights.

license terminated.[41] Also, an MTA licensee would be permitted to negotiate with incumbents within the MTA to purchase or relocate their systems, and the Commission would "presumptively consider[]" any application to transfer or assign an incumbent license to the MTA licensee to be in the public interest.[42] CellCall does not object to either proposal. The automatic reversion of unused channels to the MTA licensee is a useful "right" not otherwise available under the Commission's rules. The presumptive support for assignments to incumbents should already exist. Indeed, the Commission could not justify refusing to grant applications to assign or transfer 800 MHz SMR channels to a qualified transferee or assignee (regardless of whether it is an MTA licensee), so long as such applications comply with governing Commission rules and policies. However, stating support for such transactions is worthwhile. The Commission should similarly support channel swaps between MTA licensees and incumbents that involve relocating incumbents to lower band channels licensed to the MTA licensee.

B. The Proposals Regarding MTA Licensee Obligations Should Be Modified

23. The Commission's proposals with respect to MTA licensee obligations, like its proposals regarding the rights of MTA licensees, are in large part obligatory under the 1993 Budget Act's mandate that the Commission conform its technical and

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41/ 800 MHz Further NPRM at para. 31.

42/ Id.

operating rules for services that are substantially similar. Thus, CellCall supports granting wide-area SMR licensees five years to construct their systems.[43] A five-year benchmark is consistent with both existing wide-area SMR rules and cellular rules.[44] However, incumbent licensees who have been granted extended implementation periods under existing rules and who obtain an MTA license should be required to comply with their original implementation schedule, on which the Commission's grant of wide-area authority in part was based, and with the requirements of rule Section 90.629. The public interest will not be served by allowing such incumbents additional time in the absence of a request for waiver that demonstrates why the wide-area system cannot be implemented in accordance with the licensee's original proposal.[45]

24. The Commission tentatively concluded that an MTA licensee will be required to provide coverage to at least 1/3 of the MTA population within 3 years of license grant and 2/3 of the MTA population within 5 years of license grant.[46] These benchmarks are similar to those established for broadband PCS

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[43] See id. at para. 46.

[44] See 47 C.F.R. §§ 90.629, 22.947.

[45] The Commission believes that MTA licenses will in some instances be held by existing wide-area licensees. 800 MHz Further NPRM at n.78. If so, extending their original construction requirements beyond five years would only delay service to the public.

[46] 800 MHz Further NPRM at para. 48.

licensees.[47] However, in CellCall's view, the coverage requirements should be strengthened. Unlike competing CMRS, the 800 MHz SMR spectrum is heavily occupied, and thus MTA licensees are likely in most instances to be incumbent licensees, including those who have received or applied for rule waivers or extended implementation authority under Section 90.629 of the rules. Consequently, applying other CMRS coverage requirements will not serve the public interest in receiving wide-area service at the earliest practicable date, because many incumbents already have facilities in the core areas of their systems that comply with the proposed coverage benchmarks. Thus, CellCall believes the public interest will be served by adopting a geographic coverage requirement in conjunction with or as a replacement for a population coverage requirement.

25. CellCall agrees with the Commission that an MTA licensee should be required to satisfy its coverage requirements regardless of the extent of the presence of incumbents within the MTA, and that failure to acquire a sufficient number of channels within the MTA will not excuse a licensee's failure to satisfy coverage requirements.[48]

26. CellCall disagrees with the Commission's proposal to penalize an MTA licensee's failure to comply with coverage requirements by requiring it to forfeit its license. Instead, the Commission should adopt provisions that are based on the

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[47] See 47 C.F.R. § 24.203.

[48] 800 MHz Further NPRM at para. 49.

cellular unserved area rules and that mirror the proposal to award unconstructed incumbent channels to the MTA licensee. Thus, unconstructed channels should be available to incumbents (not including the MTA licensee who failed to construct) who need additional channels to expand their systems.[49] By limiting eligibility for unconstructed MTA channels in this fashion, the Commission addresses in part the concern that incumbents have an opportunity to expand their systems.

IV. Treatment of Incumbent Licensees

A. Relocation of Incumbent Licensees Should Be Voluntary

27. The Commission seeks comment on whether an MTA licensee should be able to require incumbent upper band 800 MHz licensees to relocate their facilities, and if so on what terms, or whether the parties should be free to negotiate the terms and conditions of any relocation. Noting the "vigorous and widespread opposition" to mandatory relocation in the record of the Regulatory Treatment Third Report, the Commission tentatively concluded that relocation should be voluntary.[50]

28. CellCall concurs with the Commission's reasoning. As the Commission notes, existing 800 MHz wide-area licensees

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[49] Again, the cellular unserved areas rules provide a model. The Commission should establish a one-day filing window on which applications for such unconstructed channels would be accepted from incumbent licensees; competitive bidding procedures should be used if mutually exclusive applications are accepted for filing. See 47 C.F.R. § 22.949. This will ensure that such channels are awarded to the entity that values them most highly.

[50] 800 MHz Further NPRM at paras. 33, 34-35.

have acquired significant amounts of their existing spectrum through voluntary transactions. The marketplace should continue to dictate the circumstances under which a licensee either will move to other spectrum to accommodate an MTA licensee or assign its channels to an MTA licensee. Furthermore, the Commission is likely to become involved in interminable disputes over what constitutes a "reasonable" inducement to relocate. The Commission should be loathe to devote its scarce resources to resolving such disputes.

29. The Commission seeks comment on whether its experience in establishing mandatory relocation provisions may serve as a model for relocation of incumbent 800 MHz SMR licensees.[51/] In this regard, the Commission's most recent model for relocation, adopted for the 2 GHz band, is not analogous. That rule[52/] was adopted after the Commission identified the need for a large block of spectrum on which to authorize new services

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51/ Id. at para. 36.

52/ 47 C.F.R. § 22.50. Applying these guidelines to the Commission's wide-area SMR proposal, for the first two years of the license term the MTA licensee and incumbent licensee would negotiate voluntary relocation agreements. In the third year the MTA licensee would be able to initiate a mandatory one-year period regarding relocation terms, during which the parties would be required to negotiate in good faith. If no agreement is reached after the third year, the MTA licensee could request mandatory relocation of the incumbent; however, the MTA licensee would be required to demonstrate that fully comparable alternative frequencies are available; guarantee payment of all relocation expenses, including all engineering, equipment, site, and regulatory fees, and other reasonable costs; and construct new SMR facilities for the incumbent and test them for comparability to the existing system.

and technologies, and a corresponding lack of such available spectrum.[53] The 2 GHz band was selected because "[t]here are substantial operations on virtually all of the lower frequency bands, so that establishment of emerging technology bands will unavoidably necessitate relocation of significant numbers of existing users. The task ... is to identify a relatively wide band of frequencies that can be made available with a minimum of impact on existing users and that also can provide suitable operating characteristics for new, primarily mobile, services."[54] The Commission also found that 2 GHz licensees (private and common carrier fixed microwave service providers) could be relocated to higher frequency bands that provided similar services and could support propagation over similar path lengths, and that there were alternatives to fixed microwave, including fiber, cable and satellite communications.[55]

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[53] Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, First Report and Order and Third Notice of Proposed Rule Making, 7 FCC Rcd. 6886, paras. 4, 6 (1992); Second Report and Order, 8 FCC Rcd. 6495 (1993), Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd. 6589 (1993); Memorandum Opinion and Order, FCC 94-60, released March 31, 1994, Second Memorandum Opinion and Order, FCC 94-303, released December 2, 1994. See also Creating New Technology Bands for Emerging Telecommunications Technology, OET/TS 92-1, January 1992, at 2, which "found that there are no frequencies available below 1 GHz that could be made available to new services. Except for a few narrow bands, this spectrum is used for broadcast or mobile services that would be very difficult to relocate."

[54] ET Docket No. 92-9, Notice of Proposed Rule Making, 7 FCC Rcd. 1542 (1992) at para. 9 (emphasis added).

[55] Id. at para. 17.